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Supreme Court, U.S.
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No. 01-1464

In The
Supreme Court of the United States

VISA U.S.A. INC. AND
MASTERCARD INTERNATIONAL INCORPORATED,

-Petitioners,

v.

WAL-MART STORES, INC., THE LIMITED, INC., SEARS, ROEBUCK AND CO., SAFEWAY INC., CIRCUIT CITY STORES, INC., NATIONAL RETAIL FEDERATION, FOOD MARKETING INSTITUTE, AND INTERNATIONAL MASS RETAIL ASSOCIATION, ETC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

1. Should the Court overrule *Eisen's* proscription of a preliminary trial on the merits, as defendants in effect seek, where the district court's rigorous and meticulous decision demonstrates, and the Second Circuit found, that the district court conducted an "exhaustive analysis . . . , carefully applying the Rule 23 requirements for class certification"?

2. Is a district court precluded from granting class certification solely because the damages portion of the trial may pose manageability problems if defendants assert a mitigation argument when (i) the argument was not raised in opposition to the class motion, (ii) the court nevertheless considered how it would address any individualized issues that might potentially emanate from such an argument, and (iii) both the viability of the argument and the majority of issues relating to it can be decided with common proof?

PARTIES TO THE PROCEEDING

In addition to the parties stated in the caption, the following parties are respondents in this proceeding:

Bernie's Army-Navy Store
Auto-Lab of Farmington Hills
Burlington Coat Factory Warehouse Corporation
Sportstop, Inc.
Payless ShoeSource, Inc.
Shoes, Etc., Inc. (d/b/a Arnold's Shoes)
The Coffee Stop, Inc. (d/b/a Torreo Coffee & Tea Company)
UCC Kwik Doc, Inc. (f/k/a UCC Express, Inc.)
Computer Supplies Unlimited
Denture Specialists, Inc.
Geneva White, D.M.D.
Scrub Shop, Inc.

and all similarly situated persons.

No respondent has a parent corporation; and no publicly held company owns ten percent or more of any named respondent's stock.

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INTRODUCTION

On February 22, 2000, the district court certified a class of four million merchants who accept Visa and/or MasterCard credit card transactions and therefore are forced to accept Visa and/or MasterCard debit card transactions. The district court found, and the Second Circuit confirmed, that "[w]ithout class certification, there are likely to be numerous motions to intervene, and millions of small merchants will lose any practical means of obtaining damages for defendants' allegedly illegal conduct." App. 31a, 95a.

The motion to certify the class was brought by class representatives, who are the largest merchants in the United States (Wal-Mart, Sears, Circuit City, The Limited and Safeway), among the smallest (Bernie's Army-Navy, Scrub Shop and The Coffee Stop), and three merchant trade associations with more than one million merchant outlets large and small. The class was certified three weeks prior to the completion of discovery encompassing more than 350 depositions and four million pages of documents, after the court had set firm dates for argument of all dispositive motions (August 4, 2000) and trial (November 27, 2000),[1] and after the parties had filed the initial reports of their trial experts.

In affirming the district court, the Second Circuit stressed the "powerful policy considerations that favor certification" and "the exhaustive analysis performed by the district court, carefully applying the Rule 23 requirements for class certification," and concluded that

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[1] The court subsequently stayed the dates for the argument of the fully briefed dispositive motions and for trial, pending the determination of defendants' Rule 23(f) appeal and petition for certiorari.

"[g]iven the strong commonality of the violation and the harm among the merchants, this is precisely the type of situation for which the class action device is suited." App. 31a. These and additional court findings "that a class action is superior to any other means of adjudication" (App. 95a), and that all of the prerequisites of Rule 23 had been established, were the result of an extraordinarily rigorous analysis of all of the legal and factual issues relevant to the district court's Rule 23 determination.

The fact that the class was certified so close to the case's conclusion gave the district court the opportunity to delve deeply into the merits of plaintiffs' antitrust claims. The court engaged in a detailed analysis of numerous merits issues, including the elements of plaintiffs' tying and attempt-to-monopolize claims, the appropriate measure of damages in a tying case, and plaintiffs' demonstration of antitrust injury.

The district court's exhaustive examination of merits issues (at the close of discovery and near the time of trial) rebuts defendants' first contrived justification for certiorari – that the district court and Second Circuit failed to perform a rigorous Rule 23 analysis by not applying the proper standards for evaluating class certification evidence. This case does not present any conflict among the circuits on this issue. Defendants' use of this case to contrive a conflict thinly masks their attempt to overturn *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and require a preliminary merits determination as part of a Rule 23 inquiry.

The rejection by the district court and Second Circuit of defendants' "injury-in-fact" challenge was so rigorous that both courts discussed the potential manageability ramifications of a mitigation argument that defendants did not even raise in opposing the class motion. This

searching and preemptive examination only added to the detailed manageability inquiry undertaken by both courts. Both courts' meticulous manageability analyses rebut defendants' second contrived justification for certiorari. Their analyses of the Rule 23 requirements and overlapping merits/class issues were so rigorous that they went to the very limits of permissible inquiries without becoming the preliminary trial proscribed in *Eisen*.

The case described in the dissent bears no relation to this case. The dissent describes a case involving weak and unmanageable claims bearing a $100 billion price tag. The dissent further describes a case where class counsel inadequately represent and manipulate class representative pawns with nominal claims in order to coerce defendants into an expensive settlement. Using these inventions, the dissent identifies two inapposite concerns: manageability and adequacy of representation based on the appropriate measure of tying damages. As to manageability, the dissent ignores the searching inquiry performed by both lower courts. As to adequacy of representation, "an issue not raised by the parties" (App. 25a), the dissent ignores both courts' findings that plaintiffs' damages methodology satisfied either measure of damages.

The real case, reflected in the record, "is precisely the type of situation for which the class action device is suited." App. 31a. The real case is one that was ready for trial, and would have been tried in the year 2000 but for defendants' so far successful avoidance of the trial plaintiffs seek, through multiple meritless appeals of the class determination. The real case does not present the fanciful $100 billion claim that defendants and the dissent invent

but a much more modest (though still very large) claim reflected in the record and court files.[2] Of course, this figure will draw closer to defendants' exaggerated sum if the case is further delayed.

STATEMENT OF THE CASE

1. Factual Background

Plaintiffs refer this Court to the district court decision for the relevant facts. App. 57a-67a. The court garnered these facts from the complaint and more than 3,000 pages of document discovery, deposition transcripts, expert reports, affidavits, and other documentation submitted on the class motion. The record was culled from discovery comprising more than 350 depositions and more than four million pages of documents.

2. Plaintiffs' Class Certification Motion

The basis of the motion was that each class member is identically subject to defendants' "Honor All Cards" tying rules. These tying arrangements contractually require all merchants who accept defendants' credit transactions to also accept their debit transactions at supra-competitive prices. Despite defendants' suggestion to the contrary (Pet.

[2] Neither defendants nor the dissent cite the record for support of their invented $100 billion figure. In the record is the district court's reference to a preliminary damages estimate of $8 billion. App. 96a. In concocting the $100 billion figure for its apparent shock value, defendants may have trebled the $8 billion and added the $63 billion prospective value the court placed on the requested injunction for the decade following the class determination. *Id.*

6), no other payment networks "impose similar requirements" that tie debit cards to credit cards. Plaintiffs also moved for certification on their equally important Sherman Act Section 2 attempt to monopolize claim. In opposition to the motion, defendants principally challenged the sufficiency of the expert reports of plaintiffs' economist, Dr. Dennis Carlton. Defendants relied on the expert report of economist Dr. Richard Schmalensee for their attack on Carlton. As the district court noted, defendants virtually ignored plaintiffs' Section 2 claim. App. 94a-95a.

3. The Expert Reports

a. Plaintiffs' Expert, Dr. Carlton

Carlton concluded that the elements of plaintiffs' tying and attempt to monopolize claims could be established by common evidence and are appropriate for class-wide determination. The district court found that defendants' attack on Carlton in this regard was "half-hearted" and "meritless." App. 92a.

Carlton also concluded that the fact and measure of every class member's injury were appropriate for class-wide determination. As the district court noted, Carlton demonstrated that in the absence of defendants' trade restraints:

- A large number of merchants would have refused to accept defendants' off-line debit cards because of their supra-competitive interchange fees (App. 63a, 86a-87a);
- Defendants would have lowered their debit card pricing to the level of on-line debit pricing to maintain merchant acceptance of their off-line debit cards (App. 63a-64a, 86a-87a); and

- Each merchant's damages could be calculated with a common formula by measuring the overcharge it had paid on all of the off-line debit transactions it accepted. *Id.*

In reaching his conclusions, Carlton relied on, among other things, Visa's 1997 decision to reduce the interchange fee for its untied, on-line debit product, Interlink. App. 66a; Joint Appendix on Appeal to the Second Circuit ("JA") 440, 2994-95. Visa lowered the fee in direct response to the refusal by class representative Wal-Mart and other merchants to accept these debit transactions at the existing rates. JA 440, 2762-65.

In concluding that in the "but-for" world, defendants would have lowered their off-line debit pricing to levels comparable with on-line debit pricing, Carlton cited a MasterCard-sponsored analysis:

> If the retailers win the suit, and the tying arrangement is removed, then practically all retailers would abandon off-line debit under its present pricing structure. The card associations would be forced to rethink their interchange fees, and come up with a new pricing schedule that could compete with on-line debit . . . . [JA 2559]

The district court found that Carlton used relevant evidence to refute defendants' contention that such a reduction in off-line debit pricing would have resulted in fewer transactions:

- In 1997, Visa dramatically lowered its interchange fees for its Interlink on-line debit product. Carlton cited a Visa document showing that shortly after the price decrease, the number of Interlink transactions rose approximately 27 percent. App. 66a; JA 2995.
- Visa also lowered its off-line debit card interchange rates in 1992. Carlton cited evidence

> showing that the number of off-line debit transactions increased by almost 50 percent in the year after the price decrease, and by almost 1200 percent five years later. App. 66a; JA 2996.

The district court also noted that Carlton used two empirical benchmarks to refute defendants' theoretical contention that credit card interchange fees would have risen in the "but-for" world:

- In Canada, credit card interchange fees are lower than in the United States despite the fact that there effectively is no tie between defendants' credit cards and debit cards. App. 66a-67a.
- Despite a dramatic increase in off-line debit volume in the United States during the 1990s, credit card interchange fees did not decline as Schmalensee's model predicts. App. 67a.

b. Defendants' Expert, Dr. Schmalensee

In a 91-page report prepared during a total of approximately 30 hours that he worked on his entire assignment, including both the class motion and the merits of plaintiffs' ultimate claims (JA 2290 at 26-27, 2300 at 66, 2299 at 62), Schmalensee disputed Carlton's conclusions on class-wide injury and damages. Schmalensee's principal criticism was his belief, apparently arrived at quickly and with virtually no knowledge of or reference to the discovery record, that Carlton did not account for several effects which Schmalensee speculated might have occurred in the "but-for" world:[3]

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[3] Schmalensee testified that (i) he did not interview anyone at Visa or MasterCard (JA 2291 at 32, 2343 at 174); (ii) he did not review any MasterCard deposition transcripts, interrogatory responses or rules (JA 2291 at 31-33, 2298 at 60); and (iii) he did not even know that he was MasterCard's class expert (JA 2295 at 48) ("I

(Continued on following page.)

- There would have been fewer off-line debit transactions because fewer banks would have issued the cards, fewer merchants would have accepted them, and defendants would have spent less money promoting them (App. 64a);
- Defendants' credit card interchange fees would have increased (App. 64a-65a); and
- The existence and extent of each merchant's injuries would depend on a number of merchant-specific factors such as the merchant's mix of debit and credit card transactions. App. 65a.

At his deposition, Schmalensee recanted most of the purported certainty of his theoretical attack on Carlton's conclusions. When asked whether he agreed with Carlton's theory of injury and damages, Schmalensee acknowledged: "I simply haven't done enough study to have a firm view on what would have happened. I think that is a possible state of affairs, I don't think it's an inevitable state of affairs." JA 2316 at 133.

Schmalensee similarly retreated when pressed about the basis for his theory that off-line debit usage would have decreased in Carlton's "but-for" world: "I'm not making a strong argument here except to just say if all those things happen as I have argued, you could easily have reduced acceptance." JA 2392 at 369. As for his and defendants' core assertion that credit card interchange fees would have increased in the "but-for" world, Schmalensee testified that he had not "pushed it far enough to have an opinion" – as noted by both courts below. App. 15a, 86a. He also admitted that he did not even ask his clients whether credit card interchange fees would have risen. JA

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worked on [my opposition report] without any notion of what MasterCard might or might not do.").

2315 at 129 ("I haven't asked the question and no one has told me that.").[4]

Schmalensee testified that class treatment in a *per se* tying case was inappropriate because, he theorized, certain members of the class inevitably benefitted from the tying arrangement. However, Schmalensee admitted that he could support class certification in a price-fixing case, even though some class members had benefitted from the price-fixing and would have been harmed by its elimination. JA 2350-51 at 201-07. He further revealed the actual basis for his opposition to the class: **Q.** "So you disagree with the current Supreme Court rule on tying?" **A.** "Sadly, I do." JA 2350 at 201. Despite this bias and despite his retractions and admissions, defendants relied almost exclusively on Schmalensee's opinions in opposing the class motion and in moving to strike Carlton's reports under the doctrine of *Daubert* and *Kumho Tire*.

4. The District Court's Decision

On February 22, 2000, the district court certified plaintiffs' Section 1 and 2 claims for a class defined as "all persons and business entities who have accepted Visa and/or MasterCard credit cards and therefore have been required to accept VisaCheck and/or MasterMoney debit cards under the challenged tying arrangements. . . . " App. 98a. The district court also denied defendants' motion to

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[4] Schmalensee also admitted that he had never seen any evidence to support his speculation that debit transactions created incremental sales and had not asked anyone at Visa whether there was support for his position: "I didn't. For purposes of this analysis, it didn't seem particularly important." JA 2438 at 454. Despite these admissions, Schmalensee's report projected that debit transactions created a five percent incremental sales figure, which he later admitted he made up. JA 2437 at 450.

strike Carlton's expert reports. App. 72a. These decisions followed an exhaustive analysis of Carlton and Schmalensee's opinions, both individually and in light of each other.

The district court found that "defendants have fallen far short of showing that Carlton's opinion is the kind of 'junk science' that a *Daubert* inquiry at this preliminary stage ought to screen." *Id.* The court found that the basis of defendants' motion was simply their disagreement with Carlton, which "is not a basis for exclusion." App. 71a-72a.

In certifying the class, the district court demonstrated its command of and obedience to *Eisen*, stating that "'[i]n determining the propriety of a class action, the question is not whether the plaintiff . . . will prevail on the merits, but rather whether the requirements of Rule 23 are met.'" App. 74a (citing *Eisen*, 417 U.S. at 178). Accordingly, the court refused to countenance a "battle of the experts" to preliminarily determine the ultimate merits: "a district court is not permitted to indulge 'dueling' between opposing experts at the class certification stage." App. 74a (citing *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999) ("Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits. Accordingly, this sort of 'statistical dueling' is not relevant to the certification determination."), *cert. denied*, 529 U.S. 1107 (2000)).

Although the district court would not indulge a duel of the experts, the meticulous point-by-point analysis of Carlton and Schmalensee, which comprises more than one-third of the district court's lengthy opinion, is telling. In every instance, the district court noted that Carlton had provided record and/or empirical evidence which refuted Schmalensee's theoretical criticisms. *See, e.g.*, App. 65a-67a, 85a-88a. When this is coupled with Schmalensee's retractions and admissions (*supra* at 7-9), it is clear that

the district court declined to indulge a "duel" only in the sense that it did not reach the inevitable conclusion that Schmalensee's report was dead on the battlefield.[5]

After its rigorous analysis, the district court concluded that plaintiffs easily satisfied the requirements of Rule 23:

- Carlton's theory "is a complete answer to the defendants' attack on the theory of the complaint," and "does not require analysis of any of the individual questions" posed by defendants. App. 82a.
- "Carlton relied on both empirical evidence and economic theory to refute the defendants' claims." App. 85a.
- "Schmalensee stated at his deposition that 'while I think it is likely' that credit card interchange fees would have risen, 'I haven't pushed it far enough to have an opinion.'" App. 86a.
- "[P]laintiffs have proffered a sufficient theory of class-wide injury under either the 'package' or the 'tied product' measure of injury." App. 87a n.15.
- Defendants have never "engaged in merchant-specific pricing . . . [and while they] do have broad pricing categories for different merchant classes[,] Carlton's damages methodology could easily be adjusted to account for that fact if necessary." App. 88a.
- Defendants' argument that under Carlton's theory there would be "winners" and "losers" making class-wide assessment of injury inappropriate "is

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[5] This message was not lost on defendants, however, who withdrew Schmalensee when they filed the reports of their trial experts. Schmalensee, unlike Carlton, had originally been retained to analyze both the class issues and the ultimate merits of the case. JA 1636 at 8; 3340 at 26.

immaterial" under plaintiffs' "overcharge theory" of damages. App. 88a.

- "According to Carlton's theory, injury and causation is present for every putative class member." App. 90a.
- Defendants' "half-hearted contentions that some of the substantive elements of plaintiffs' claims are not susceptible to class-wide treatment . . . are meritless." App. 92a.

The district court also rejected defendants' argument that because plaintiffs could allegedly "steer" consumers away from paying with defendants' debit cards (although plaintiffs are contractually required to accept them), plaintiffs could not demonstrate common injury/causation. App. 89-90a. The Second Circuit and the dissent agreed with the district court's rejection of this steering/causation argument. App. 16a-17a, 41a n.3. The district court noted that the argument might be "repackaged as one addressing mitigation of damages." App. 90a.

Contrary to defendants' assertion that the district court "acknowledged that [defendants] had raised a substantial mitigation defense" (Pet. 9), the court merely advised defendants that their "steering" argument (framed as one addressing causation) was misplaced. The court nevertheless preemptively considered the potential manageability implications of the unasserted mitigation argument. The court held that if it becomes an issue, there are numerous tools which can be employed to deal with it. App. 90a-91a, 97a.

The district court concluded by stressing that, in addition to satisfying all the Rule 23 requirements, there were important policy considerations supporting certification: "Without class certification, there are likely to be numerous motions to intervene, and millions of small merchants will lose any practical means of obtaining

damages for defendants' allegedly illegal conduct." App. 95a.

5. The Second Circuit's Affirmance

The Second Circuit affirmed, upholding the district court's distinction between a decision on Rule 23 and a preliminary decision on the ultimate merits. App. 11a-12a. The Second Circuit similarly upheld the district court's conclusion that this distinction precluded it from engaging in a merits-based "battle of the experts":

> [A] district court may not weigh conflicting expert evidence or engage in "statistical dueling" of experts. The question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive. [App. 12a (citing *Caridad*, 191 F.3d at 292-93).]

After considering the district court's thorough analysis of the expert opinions, the Second Circuit rejected as "meritless" defendants' claim that the district court did not sufficiently examine Carlton's expert evidence. App. 12a. The court addressed the failure of each of defendants' challenges to the class decision, noting that many of them "appear merely to rehash their many [rejected] criticisms of Carlton's theory." App. 16a-17a.

In his dissent, Judge Jacobs identified two alleged errors in what he termed "the district court's otherwise thorough opinion." App. 35a. First, he erroneously concluded that the damages portion of the trial would be unmanageable because of an alleged need for individualized determinations. This was based on his speculation that (i) defendants would repackage their rejected steering/causation argument as a mitigation defense, (ii)

plaintiffs' pending dispositive motion to strike the steering defense would fail, and (iii) defendants would then sustain their burden of proving mitigation through steering. App. 37a-41a.

Second, Judge Jacobs argued that the district court improperly declined to decide the proper measure of damages in a tying case. He asserted that under the "package" measure, this case would present irreconcilable conflicts among class members that would render the class representation inadequate under Rule 23(a)(4). App. 43a-55a. This issue was not raised, briefed, nor argued in either court below. App. 25a. Central to his dissent was an underlying concern that class certification would force defendants into an unjust settlement.

The Second Circuit rejected each of Judge Jacobs' concerns. With respect to mitigation/manageability, the court "emphasize[d] that 'the issue of manageability of a proposed class action is always a matter of justifiable and serious concern for the trial court and peculiarly within its discretion.'" App. 23a (citation omitted). The Second Circuit also found that the "district court recognized that although it appeared at this preliminary stage that damages could be determined with the aid of a class-wide formula, . . . [it] adequately considered how it would address any individualized issues that might arise in the case . . . ." *Id.* The court further noted that the viability of defendants' mitigation defense was itself subject to common proof, as were "the majority of the issues relating to this defense . . . ." App. 18a, 20a-21a.

As to the proper measure of damages, the Second Circuit pointed to three crucial facts ignored by Judge Jacobs that undercut his assumption that credit card interchange fees would have risen in the "but-for" world. This assumption is a necessary condition for the "tied

product" versus "package" dispute to have any relevance. First, he ignored the district court's finding that plaintiffs "offered both empirical and theoretical support for their claim . . . that, in the 'but for,' untied world, defendants . . . would not have raised the credit card interchange fees." App. 86a-87a. This finding "rendered such a decision [on the appropriate measure of damages] unnecessary," because under either measure, all four million class members have suffered antitrust injury. App. 26a-27a, 87a n.15.

Second, Judge Jacobs ignored the fact, noted by both courts, that defendants' own expert had no opinion on whether defendants' credit card interchange rates would have risen in the "but-for" world. App. 15a, 86a. Third, he ignored evidence cited by the district court that defendants' anticompetitive conduct was intended "in part to keep credit card interchange fees high." App. 15a, 86a & n.14. Ignoring these crucial facts, Judge Jacobs criticized the courts for allegedly failing to consider the adequacy of class representation, an issue raised by none of the parties.

Despite these failings, the Second Circuit addressed Judge Jacobs' concern about irreconcilable conflicts. The panel concluded that even assuming the "package" measure of tying damages was proper, the concern was "overstate[d]" because of the common interest among all class members to prove that absent the tie, debit card fees would drop and credit card fees would not increase. App. 27a-29a.

The Second Circuit similarly dismissed as "largely inapposite" Judge Jacobs' concern that granting class certification would coerce defendants into settlement. App. 30a-31a. The panel held that while the potential for such a coercive effect may be a basis for granting a Rule 23(f)

appeal, it is not relevant to deciding the appeal: "Now that we have granted the appeal and found the district court's certification decision to be thorough, accurate, and not an abuse of discretion, the dissent's argument about coercion loses its force." App. 31a.

The Second Circuit emphasized the "powerful policy considerations that favor certification" and "the exhaustive analysis performed by the district court, carefully applying the Rule 23 requirements for class certification," and concluded that "[g]iven the strong commonality of the violation and the harm among the merchants, this is precisely the type of situation for which the class action device is suited." *Id.* The Second Circuit denied defendants' petition for rehearing and rehearing *en banc* without dissent. App. 101a.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT ANY CONFLICT AMONG THE CIRCUITS REGARDING THE STANDARDS FOR EVALUATING EVIDENCE AT CLASS CERTIFICATION

A. Defendants' Question on the Proper Standards for Evaluating Evidence Has No Application to the Facts of this Case

The portion of defendants' question addressing the proper standard for evaluating evidence at class certification is based entirely on the contrivance that the district court did not perform a rigorous analysis of the evidence submitted by the parties. Pet. 14-15. Defendants have selected the wrong decision to question on this ground. The Second Circuit pointedly noted that the

district court performed an "exhaustive analysis . . . , carefully applying the Rule 23 requirements for class certification." App. 31a. Even a cursory review of the decision reveals the painstaking scrutiny the district court gave to the parties' expert reports. *See supra* 9-13.

The court did not merely find that plaintiffs' expert evidence was "colorable or admissible," as defendants claim. Pet. 3-4, 17-18. On the contrary, the court thoroughly evaluated each of the numerous theoretical criticisms defendants leveled at plaintiffs' injury and damages methodology and concluded that plaintiffs had rebutted all of them, in most cases with empirical evidence. The Second Circuit dismissed as "meritless" defendants' contention to the contrary: "The district court, in an almost fifty page opinion, thoroughly considered each of defendants' criticisms of Carlton's theory and Carlton's response to each of those criticisms and concluded in each case that Carlton's response sufficiently addressed the criticism." App. 12a.

The district court's rigorous analysis delved deeply into the merits and exhaustively evaluated the class evidence culled and submitted by the parties from the massive and virtually complete discovery record. There is nothing more the court could have done without making a preliminary determination on the ultimate merits.

B. This Case Does Not Conflict with Defendants' Cited Cases

Rather than clash, this case harmonizes with those cited by defendants to support their contrived conflict among the circuits. In *West v. Prudential Sec., Inc.*, 282 F.3d 935 (7th Cir. 2002), the Seventh Circuit reversed a district court's decision to certify a class that was based on (i) an empty factual record, (ii) a theory that sharply

departed from both Supreme Court precedent and "normal understanding," and (iii) an unscrutinized expert report that lacked any empirical or theoretical support and was internally inconsistent. *Id.* at 937-40. The district court viewed the clash of reputable economists alone, without any analysis of their competing opinions, as sufficient to support class certification. *Id.* at 938.

The absence of analysis by the district court in *West* is a far cry from the rigor with which the district court examined the expert reports in this case. Notably, the court here engaged in some fifteen pages of point and counterpoint analysis of the Carlton and Schmalensee reports. The minimal support for certification offered in *West* contrasts dramatically with the richness of the record evidence, empirical benchmarks, theory, and case precedent supporting plaintiffs' class motion.

Defendants fare no better in contriving a conflict between this case and *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001). There, the Seventh Circuit remanded for further review the class decision because the district court refused to look beyond the complaint to consider the contested Rule 23 issues or the recognized problems with certifying the class. *Id.* at 674-76. The Seventh Circuit held that this refusal constituted a failure to exercise the court's discretion, noting that nothing in Rule 23 or *Eisen* "prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers." *Id.* at 677. Far from "abdicat[ing] its responsibility" under Rule 23 (Pet. 3), the district court in this case firmly exercised its discretion by performing an exhaustive Rule 23 analysis that went well beyond the complaint. The district court here did precisely

what the Seventh Circuit in *Szabo* and *West* held a district court is required to do.

Defendants' remaining cases also fail to demonstrate a conflict. These cases simply stand for the unremarkable proposition that in ruling on a class motion, a district court may need to look beyond the pleadings. *See Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 186 (3d Cir. 2001) ("The issue, then, is whether in making a class certification decision the court must take as true the allegations in the complaint where those allegations are unsupported, and in some instances rebutted, by a well-developed record."); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001) ("'[I]t may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.'") (citation omitted); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 297 (1st Cir. 2000) (affirming certification where district court "engaged in a case-specific analysis that went well beyond the pleadings"); *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) ("A district court certainly may look past the pleadings . . . . ").

The "common thread" in defendants' cases (Pet. 18), is the principal that a district court must perform a rigorous analysis that may need to go beyond the pleadings in order to do so. The district court in this case obviously obeyed and went beyond this standard of rigor.

C. There Is No Conflict Among the Circuits Here

Not only have defendants failed to present a conflict between the cases they rely upon and this one, but they have also failed to find any case that identifies such a conflict. Defendants have further failed to find any case criticizing the decision to grant class certification in this

case. On the contrary, the district court's decision has been cited with approval by several courts outside of the Second Circuit because it correctly applied the standards for evaluating expert evidence applied by courts in all circuits.

In particular, courts in both the Third and Seventh Circuits – the alleged source of the contrived conflict – have explicitly approved the approach taken by the district court in this case. *See In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 217 n.13 (E.D. Pa. 2001) ("To the extent that this discussion involves a battle of experts, it [is] not appropriate for the Court to determine which expert is more credible at this time. . . . To preclude such evidence at the class certification stage, it must be shown that the 'opinion is the kind of "junk science" that a *Daubert* inquiry at this preliminary stage ought to screen.'") (citing *In re Visa Check*, 192 F.R.D. at 78) (App. 72a); *Bromine Antitrust Litig.*, 203 F.R.D. 403, 408 (S.D. Ind. 2001) (citing *Linerboard* for identical language). Since *Bromine* and *Linerboard* also cite *Szabo* and *Newton* as controlling on the relevant issue in their respective circuits (7th and 3rd), these courts recognize what is obvious – there is no conflict with the Second Circuit. This Court recently denied a petition for certiorari that alleged a virtually identical circuit conflict as that alleged here. *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 120 S. Ct. 1349 (2002).

Courts in other circuits have similarly approved the district court's treatment of the expert evidence in this case. *See, e.g., In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 311 (E.D. Mich. 2001); *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 470 (S.D. Ohio 2001); *Vickers v. General Motors Corp.*, 204 F.R.D. 476, 479 (D. Kan. 2001). Numerous other cases have similarly refused to allow a "battle of the experts" at the class certification stage. *See,*

e.g., DeLoach v. Philip Morris Cos., Inc., No. CV1235, 2002 WL 559453, *13, 15 (M.D. N.C. Apr. 3, 2002); *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 324 n.16 (C.D. Cal. 1998); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 486-87 (W.D. Pa. 1999); *In re Terazosin Hydrochloride Antitrust Litig.*, 203 F.R.D. 551, 556 n.6 (S.D. Fla. 2001); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D. Minn. 1995); *Sollenbarger v. Mountain States Tel. and Tel. Co.*, 121 F.R.D. 417, 424-25 (D. N.M. 1988); *Wilfong v. Rent-A-Center, Inc.*, No. CV-0680, 2001 WL 1795093, *3 n.5 (S.D. Ill. Dec. 27, 2001).

The contrived nature of defendants' current argument is strikingly revealed by the fact that defendants are now arguing directly against the positions they took below. Defendants acknowledged to both courts below that there can be no battle of the experts at the class stage.[6] Defendants also told the Second Circuit that they believed that *Caridad's* prohibition of expert duels was correct.[7] Moreover, defendants, not plaintiffs, told the district court that the proper standard for evaluating expert evidence

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[6] *See, e.g.*, JA 3193 ("It is absolutely clear you should not be weighing who is right and who is wrong when they disagree about something . . . . "); *Id.* ("I quite agree we cannot weigh the expert testimony . . . . "); JA 3194 ("I know we are not going to weigh [Carlton's] view against Professor Schmalensee on any details . . . . "); Def. 2nd Cir. Rep. Br. at 6 ("The district court is, of course, foreclosed from adjudicating the merits and from weighing the relative persuasiveness of dueling expert opinions on the merits of plaintiffs' claims.") (citing *Eisen* and *Caridad*).

[7] *See, e.g.*, Trans. of Arg. Before 2nd Cir. at 12 ("[W]e don't quarrel with *Caridad* at all . . . . "); Pet. for 2nd Cir. Rehearing at 7 n.8 ("It is not our position that *Caridad* was wrong" in refusing to engage in a battle of the experts.).

was whether it was "fatally flawed," "inadmissible," or "implausible."[8]

D. Defendants Are Seeking to Overturn *Eisen*

Defendants are not asking this Court to address the so-called "confusion" among the circuits concerning *Eisen*. They are asking this Court to overrule *Eisen*. Regardless of whether any other district court misinterpreted *Eisen*, the district court here surely did not. The court carefully reviewed the parties' expert submissions, both individually and in light of each other, and rigorously considered an extensive evidentiary record. The only thing the court did not do was make a preliminary determination of the merits. Neither *Eisen* nor any of defendants' so-called "conflicting" cases require this ultimate step. On the contrary, they strictly forbid it:

> The success of the 1966 amendments (which are still in force) depends on making a definitive class certification decision before deciding the case on the merits, and on judicial willingness to certify classes that have weak claims as well as strong ones. A court may not say something like "let's resolve the merits first and worry about the class later" (Rule 23(c)(1) requires the certification decision to be made "[a]s soon as practicable . . . .") or "I'm not going to certify a class unless I

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[8] *See, e.g.*, JA 518, 540-42 (asserting "fatally flawed" and "admissibility" standard); Def. Rule 23(f) Pet. at 11, 13-14, 16, 18-19, 21, 23-24, 35 (asserting "plausibility" standard); Def. 2nd Cir. Br. at 14, 20-23, 25-26, 34 (asserting "fatally flawed" and "plausibility" standard). At oral argument before the Second Circuit, defendants refused the court's invitation to draw any distinction between a "fatally flawed" and "plausibility" standard. *See* Trans. of Arg. Before 2d Cir. at 52-53; *See also* Def. 2nd Cir. Br. at 21-22 (defendants equate "facially implausible" with "fatally flawed.").

> think that the plaintiffs will prevail." [*Szabo*, 249 F.3d at 677.]

See also Castano, 84 F.3d at 744 (*Eisen* stands for the "unremarkable proposition that the strength of a plaintiff's claim should not affect the certification decision.").

Defendants' challenge is therefore a direct attack on *Eisen* and its well-understood holding that a Rule 23 inquiry cannot include a preliminary determination of the merits. The dissent acknowledged the powerful policy reasons behind this holding: "The rule against pre-certification decisions on the merits is non-partisan and serves neutrally to avoid the risk that a 'court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings.'" App. 39a (citing *Eisen*, 417 U.S. at 178).

Defendants' request for a clear articulation of the scope of a Rule 23 inquiry is misplaced since, as defendants recognize, this Court has already provided it. Pet. 19-20 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) ("[T]he class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'") (citation omitted); and *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) ("[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.")).

Coopers, *Falcon*, and *Eisen* taken together set a clear standard which the district court scrupulously followed:

> A court may certify a class action only if it is "satisfied, after rigorous analysis," that the rule's prerequisites have been established. [citing *Falcon.*] This analysis will inevitably be "enmeshed in the factual and legal issues comprising the

> plaintiff's cause of action." [citing *Falcon* and *Coopers.*] In some cases, . . . it will be necessary to conduct discovery to establish a sufficient evidentiary record from which to make the class determination. . . . "[T]he question is not whether the plaintiff . . . will prevail on the merits, but rather whether the requirements of Rule 23 are met." [citing *Eisen.*] [App. 73a-74a (citations omitted).]

This standard has been followed in every circuit, including those where defendants vainly search for a conflict. *See, e.g., Szabo*, 249 F.3d at 677; *Castano*, 84 F.3d at 744 & n.17; *Waste Mgmt.*, 208 F.3d at 297-98.

II. THIS CASE DOES NOT PRESENT ANY CONFLICT AMONG THE CIRCUITS REGARDING THE ISSUE OF MANAGEABILITY

A. Defendants' Manageability Question Has No Application to this Case

Defendants contend that the district court refused to decide *existing* and *identifiable* manageability problems stemming from an alleged need for individualized damages determinations. *See* Pet. (i), 4, 20-23. Not only were there no such problems before the district court, but defendants never even asserted a manageability/damages argument.

Defendants *did* assert that plaintiffs could not prove common injury-in-fact because of the alleged ability of some merchants to "steer" customers away from defendants' debit cards (which they are contractually required to accept). The district court rejected this argument but advised defendants that it might be "repackaged" as a damages mitigation argument. App. 90a. Typical of its forward-looking analysis, the district court went on to consider this yet-to-be raised mitigation

argument and the various class action tools that could be used to address any manageability issues that might arise. App. 90a-91a, 97a. Thus, far from hiding from any *existing* and *identifiable* manageability issues, the court went out of its way to consider manageability issues that were not raised, and might never be ripe.[9]

B. There Is No Conflict Among the Circuits Here

Defendants' manageability cases bear no relation to this case. Each one involved a district court that had to deal with real and ripe manageability issues. *See Windham v. American Brands, Inc.*, 565 F.2d 59, 70 (4th Cir. 1977) (substantial evidence of "serious problems now appearing"); *In re Hotel Tel. Charges*, 500 F.2d 86, 89, 92 (9th Cir. 1974) ("no possibility that common questions can

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[9] There is no support in the record for Judge Jacobs' assertion that the purported mitigation/manageability problem "has been 'apparent' from the outset." App. 40a. First, he ignored the manageability findings of both courts. Second, he ignored the evidence of the numerous common issues which riddle defendants' mitigation defense, which demonstrates that merchants cannot steer, and which is the subject of plaintiffs' pending motion to dismiss the defense: (i) defendants' rules prohibit steering; (ii) defendants have disguised their debit cards to look like credit cards to prevent merchant attempts to steer; (iii) defendants' tying rules and related anticompetitive conduct have caused banks to actively impede merchant attempts to steer; (iv) merchant attempts to steer lead to substantial customer service problems; and (v) it is not possible for any merchant to steer cost-effectively. *See, e.g.* JA 2189-92 and evidence cited therein. Judge Jacobs not only failed to account for any of this evidence, he also failed to address the proper legal standard for evaluating the mitigation defense; namely, defendants must show that mitigation is feasible and cost-effective. *See, e.g., Litton Sys., Inc. v. American Tel. and Tel. Co.*, 700 F.2d 785, 820 (2d Cir. 1983); *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 863 (5th Cir. 1981).

predominate" leading to "mind-boggling manageability problems"); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) ("A single litigation addressing every complication in every model of prosthesis, including changes in design, manufacturing, and representation over the course of twenty-two years, as well as the unique problems of each plaintiff, would present a nearly insurmountable burden on the district court."); *Newton*, 259 F.3d at 191 ("The need for individualized inquiry into actual injury [would be] . . . 'a mind-boggling undertaking.' . . . With hundreds of millions of trades, it is difficult to imagine how this case can be tried.") (citation omitted); *Castano*, 84 F.3d at 742 n.15 ("We find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered.").

None of these cases hold that a district court should refuse to certify a class on the basis of manageability problems that might appear in the future. Indeed, *Windham* holds just the opposite: "Concededly, a district court should not decline to certify a class because it fears that insurmountable problems may later appear." 565 F.2d at 70. Rather than "postpone" its manageability determination as defendants pretend (Pet. 21-23), the district court made a firm determination based on the facts before it. The court took the additional step of considering whether and how it could deal with any individual damages issues that might arise. App. 23a, 90a-91a, 97a. Defendants' attempt to characterize this forward-looking and preemptive rigor as a failure to exercise any discretion is wrong.

The Second Circuit thoroughly reviewed the district court's damages/manageability determination despite acknowledging that defendants did not brief the argument

in the district court. App. 17a n.7. In upholding the lower court's discretion, the Second Circuit relied on:

- The district court's finding "that damages could be determined with the aid of a class-wide formula" (App. 23a);
- The district court's consideration of "how it would address any individualized issues that might arise" (*Id.*);
- The existence of numerous management tools available to the court to address any such individualized issues including bifurcation, appointment of a special master, decertification, creating subclasses, and amending the class (App. 22a-23a);
- The presumption against denying certification based on manageability alone (App. 21a);
- The fact that the viability of, and majority of issues relating to, defendants' unasserted damages/mitigation defense is subject to common proof, and that plaintiffs have moved for summary judgment to dismiss the defense (App. 18a & n.8, 20a).

The Second Circuit also considered the inherent manageability of this case compared to one of the principal cases on which defendants relied below, *Abrams v. Interco, Inc.*, 719 F.2d 23 (2d Cir. 1983):

> In stark contrast [to *Abrams*], the action before us involves only two products . . . with set interchange fees and class members who can be identified by defendants' own records. In this action, unlike in *Abrams*, there are no individualized issues relating to each plaintiffs' [sic] relationship with Visa and MasterCard because defendants' "honor all cards" rule contractually applied to each of the plaintiffs . . . . Additionally, plaintiffs here, unlike in *Abrams*, have alleged a

> common practice affecting each member of the class and have proffered a damages formula to assist with the calculation of damages. [App. 24a.]

The Second Circuit further emphasized that the question of manageability is "peculiarly within [the district court's] discretion." App. 23a (citing *Windham*, 565 F.2d at 65). *Windham* explains why:

> This is so because the [manageability] issue is one of fact, subject to determination by the district court; it is "a practical problem, and primarily a factual one with which a district court generally has a greater familiarity and expertise than does a court of appeals. Consequently, it is an area in which the trial court must of necessity be granted a wide range of discretion." And this is particularly true in actions governed by Rule 23(b)(3). [565 F.2d at 65 (citation omitted).]

Newton concurs: "Turning to manageability, the District Court's evaluation must be 'granted a wide range of discretion. Manageability is a practical problem, one with which a district court generally has a greater degree of expertise and familiarity than does the appellate court.'" 259 F.3d at 191 (citations omitted). *See also* App. 21a-22a (citing *Yaffe v. Powers*, 454 F.2d 1362, 1365 (1st Cir. 1972) ("[F]or a court to refuse to certify a class . . . because of vaguely-perceived management problems . . . discount[s] too much the power of the court to deal with a class suit flexibly, in response to difficulties as they arise.")). Affording the district court such "a wide range of discretion" is particularly appropriate here where the court (i) performed an exhaustive Rule 23 analysis, (ii) even considered unripe and unraised manageabilty issues, and (iii) supervised this case for more than three years with its voluminous discovery record, from which the class record was culled.

III. THIS CASE PRESENTS NO ISSUE FOR THIS COURT TO DECIDE

This case does not present any issue on which there is a conflict among the circuits. The lower courts' decisions reveal an extraordinarily rigorous analysis of the Rule 23 requirements, including an extensive and forward-looking manageability inquiry. The lower courts went to the limits of what *Eisen* permits, without rendering the preliminary merits determination proscribed by *Eisen*.

There are three actual bases for defendants' petition. First, they seek to overrule *Eisen* and bypass the procedure established by Congress for changing Rule 23.[10] Second, defendants seek to extend the more than two-year delay that the Rule 23(f) procedures have so far entailed.

Third, defendants make an alarmist doomsday plea that the Court disregard the rigor of the lower courts' analyses, because they say that class certification "creates enormous coercive pressure" (Pet. 24); "creates hydraulic pressure on defendants to settle" (Pet. 25); and amounts to "'judicial blackmail.'" *Id.* (citation omitted). Defendants' predicament is not a product of coercion or blackmail. It is the product of their conduct and the requirements of Rule 23, rigorously analyzed and applied in a case where the Second Circuit said that "[g]iven the strong commonality of the violation and the harm among the merchants, this is

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[10] As this Court recently recognized, "we are bound to follow Rule 23 as we understood it upon its adoption, and [] we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999). This process entails "an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

precisely the type of situation for which the class action device is suited." App. 31a.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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